

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6104

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-6104

B
P/S

ALFRED KIRSHNER
98 Van Cortlandt Park South
Bronx, New York 10463
Phone: 212 543 9038

Plaintiff-Pro Se
Appellant

TO BRING FOR
TRUSTEE DEFENDANT-APPELLEE

VS

TO BRING FOR

TRUSTEE DEFENDANT-APPELLEE

UNITED STATES OF AMERICA
SECRETARY OF THE TREASURY
COMMISSIONER OF I.R.S.

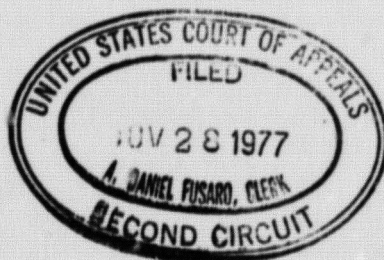
ALVIN D. LURIE in his capacity
as Asst. Commissioner
Employer Plans & Exempt
Organizations, I.R.S.
c/o U.S. Attorney Civil Division
1 St. Andrews Plaza, 5th Floor
New York, New York

BERNARD GOLDBERG
REUBEN MITCHELL
JOSEPH SHANNON
ROBERT CHRISTEN
VICTOR CONDELLO
HARRISON GOLDIN
JAMES REGAN

Individually as Trustees of Teachers Retirement System
of City of New York, 40 Worth Street, New York, N. Y.

Isaiah Robinson
110 Livingston Street, Brooklyn, New York
Individually as Former Trustee, "TRS".

Defendants Appellees



OFFICE OF COUNSEL

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LAW OFFICE
CITY OF NEW YORK

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STANDING UNDER SECURITIES LAWS 10(b), 10b-5, and 17a.

Trustee Defendants err in stating on p.22, POINT III, that Plaintiff lacks standing vs Trustee Defendants.

THE PLAINTIFF DOES NOT HAVE STANDING TO ALLEGE A CAUSE OF ACTION UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934. PLAINTIFF IS NOT A PURCHASER OR A SELLER OF THE SECURITY, NEW YORK CITY BONDS WHICH PURCHASE IS BEING CHALLENGED UNDER THE ACT.

Trustee Defendants citation of Blue Chip Stamps as ground for denying standing does not apply because Manor Drug Stores was a non derivative, damages action, Such / actions are confined to actual purchasers and sellers under 10 b-5. This is a stockholder derivative suit. No damages are asked. No private benefits are involved. It is a suit to restore the assets of the TEACHERS RETIREMENT SYSTEM, (hereafter designated as TRS) to their original, full funded, non speculative investment condition.

Blue Chip Stamps states that a derivative action may be brought if the action meets the Birnbaum criteria, which this suit does:
(a) actual purchase of NYC^{above market price} bonds / (b) injury experienced by loss of \$30million in sale of sound corporates (c) Financial interest in protecting TRS assets.

Further support of standing is provided by Klamberg v Roth 75CIV1507. Plaintiff sued pension trustees for selling 70% of pension's assets to buy employers stock; claimed trustees conduct was for the benefit of the employer and constituted a scheme to defraud.

CITATION

Judge Cannella held in slip decision #45280:

MICROFILM

OCT 21 1973

Motion to dismiss the complaint, for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction, is denied.

Plaintiff, as beneficiary of a trust, has standing to bring an action based on § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, against the trustees of the trust.

The facts alleged in the complaint are taken as true. A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967).

This conflicts with Judge Pierce's ruling in my similar suit. Both Judges in the Second Southern District Court.

Trustee Defendants err in stating on p.22 that
PLAINTIFF'S
CAUSE OF ACTION SHOULD BE DISMISSED FOR
FAILURE TO SHOW ANY MATERIAL MISREPRESENT-
ATION OR FAILURE TO DISCLOSE RELEVANT FACTS.

Allegations of material misrepresentations and fraud are listed in Plaintiff-Appellant's Brief pages 14-19. If Discovery and a hearing of expert testimony were not denied, deceit, and nondisclosure could be shown to prove fraud as required by Santa Fe Industries v Green 430 US 462 (1977).

CITATION

Schoenbaum v Firstbrook 405 F 2d 218

Summary Judgment

[1,2] The district court's grant of summary judgment against the plaintiff was accompanied by a refusal of his request for discovery. This court has indicated that summary judgment should rarely be granted against a plaintiff in a stockholder's derivative action especially when the plaintiff has not had an opportunity to resort to discovery procedures. See, for example, *Subin v. Goldsmith*, 224 F.2d 753 (2d Cir.), cert. denied, 350 U.S. 883, 76 S.Ct. 136, 100 L.Ed. 779 (1955); *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949); *Fogelson v. American Woolen Co.*, 170 F.2d 660 (2d Cir. 1948). The plaintiff typically has in his possession only the facts which he alleges in his complaint. Having little or no familiarity with the internal affairs of the corporation, he is faced with

affidavits setting forth in great detail management's version of what actions were taken and what motives led the affiants to take these actions. Since the facts in such a case are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff provide a ground for recovery, at least not without allowing discovery in order to provide plaintiff the possibility of counteracting the effect of defendants' affidavits.

[3] Indeed in many stockholder's derivative actions there will be issues as to the knowledge, intent and motive which will require a full trial with an opportunity to observe the demeanor of the witnesses, and to conduct cross-examination in open court. In such cases

summary judgment cannot be granted even after discovery has been had. See *Subin v. Goldsmith*, supra, 224 F.2d at 757. See also *Poller v. CBS*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); *Cross v. United States*, 336 F.2d 431, 434 (2d Cir. 1964); *Alvado v. General Motors Corp.*, 229 F.2d 408, 411-12 (2d Cir. 1955), cert. denied, 351 U.S. 983, 76 S.Ct. 1050, 100 L.Ed. 1497 (1956). (For a discussion of a number of additional cases, see Judge Frank's opinion in the *Subin* case.)

Trustee Defendants err in stating on p.23 that

There is serious doubt whether plaintiff's interest in the pension fund is a security within the meaning of Section 10(b) of the Security and Exchange Act. In Robinson et al. v. United Mine Workers of America Health, and Retirement Funds, et al., D.C., Dist. Columbia, Civil Action 77-0698, Federal Securities Law Reports ¶96, 118, the Court held that the interest of a coal miner in United Mine Workers Benefit Plan and Trust is not a security within the meaning of 10(b) of the Securities Exchange Act of 1934.

My suit differs significantly from Robinson in that NONE of the TRS pension benefits to plaintiff and Minority Pensioners are paid out of current contributions, the ground Judge Gesell found for ruling the miner's interest was not a security.

All benefits to TRS pensioners are paid out of earnings of the fully funded Annuity Reserve Fund and Pension Reserve #1 Fund. The Annuity Reserve Fund consists of the pensioner member savings

investment contributions and the Pension Reserve Fund #1 consists of the City's contributions of deferred wages of pensioners, made only while they were employed, no current contributions are made to this fund.

Trustee Defendants err in stating on p.23

But even if the interpretation of the term security by the Court of Appeals in Daniel is correct, the plaintiff in the instant case would still lack standing to sue.

The Daniel case differs from mine in two respects

- (1) the Teamsters Pension Fund is under ERISA; TRS is under 26USC401/503.
- (2) the Teamsters Pension Fund is non-contributory, only employers contribute; TRS is an employee contributory fund with present pensioners having made savings investments prior to retirement of 47% of fully funded assets.

CITATION

In Daniel v Intern. B. Teamsters, August 20, 1977, Seventh Circuit Court of Appeals, # 76-1855, held that :

Interests in pension funds are securities. Joining a pension fund is a security sale. security

An employee interest in a pension fund is an investment, contract

like an interest in a mutual fund or variable annuity contract, which have been previously held to be securities. Pension member contributions are investments.

17a of the Securities Act of 1933 impliedly provides for a private cause of action.

Federal District Court has jurisdiction to hear complaint of pension member regarding exclusive benefit breach by pension fund trustee.

The decisions above cover the issues raised by Kirshner & support his standing.

Plaintiff and Pensioner Minority interests in TRS are "securities" under SEC because 47% of their trust assets were self contributed savings in an investment contract.

Plaintiff and Pensioner Minority ^Cacquired a security interest in TRS when they joined and made savings investments in it. This constituted a "sale", defined as including "every....disposition of a security or in rest in a security for value."

At the time of the "sale" or entrance into TRS the TRS Trustees and members were in a prudent man/ fiduciary liability/ investment contract relationship. Since the prudent man and fiduciary liability laws and doctrines had coexisted for more than 100 years throughout the USA teachers joining TRS 25 to 50 years ago had reason to expect their continuance.

When present TRS Trustees, in a conflict of interest situation, demanded and received exemption from the prudent man/ fiduciary liability rules they ^{breached the sales terms of} the investment contract and relationship with TRS retiree members! They were obliged by Securities laws to disclose that and all material facts involved prior to their sale of more than \$200 million of TRS sound corporate bonds at a loss of \$30 million and the purchase of NYCity bonds at a price above market; the loss of \$188 million in interest in MAC bonds resulting from the exchange of 11% to 6% MAC's; and the other damaging terms and "sales" under the Nov.26,1975 "Agreement", carried out against the advice of counsel.

This they failed to do. This conduct constituted a scheme to defraud and was in violation of 10b, 10 b5, and 17a of the Securities laws. Since these fraudulent acts were inherently wrong transfers TRS assets should be restored to their original condition.

CITATION

Eaves v Penn; Usery v Penn. 426F. Supp. 830 (1977)

In cases of breach of trust by fiduciary which adversely affect interest of pension plan participants and beneficiaries, appropriate goal of equitable relief should be to restore the plan participants and beneficiaries to position they would have been but for the unlawful acts. Employee Retirement

Because the issues in the Daniels case were decided in an Appeals Court and are closely related to those in my case, I have attached a copy of the amicus curiae brief, a public document, filed by SEC in Daniel after tab X.

CONSTITUTIONALITY OF TRS TRUSTEES ACTIONS.

Trustee Defendants err in stating on p.16, POINT I that "Plaintiff's claim is based on an alleged breach of the trustees fiduciary duty....which does not rise to a constitutional violation."

My claim is that TRS Trustees have violated Security Laws 10b, 10b5, 17a ; 26 USC 401/503 ; and the due process and equal protection provisions of the Fifth Amendment of the Constitution. That by so doing they waste the assets of TRS and jeopardize the future payments of pensions to its Pensioner Minority.

The extent of my vested interest in TRS was presented to establish my qualification to act as stockholder in this derivative suit. The objective of this suit is to preserve the remaining assets of TRS by injunctive relief and to restore TRS to its original sound financial condition. The Trustee Defendants have not addressed themselves to these facts.

Instead a diversion in the form of the Scaglione v Leavitt case is raised. In Scaglione v Leavitt the Court of Appeals NYState, ruled that only the Legislature has the right to determine what are legal investments and what the investment limits (100% for NYCity obligations) for one security are for pension funds. Also that the Legislature has the right to exempt specific pension fund trustees from fiduciary liability when purchasing NYCity obligations.

In effect the Scaglione decision nullified the 146 year old prudent man rule for pension fiduciaries in NY State. However, no State law or ruling can supercede or repeal federal laws. 26 USC 401 and 503 are federal laws under which TRS has been registered since 1940, and continues to be so registered in order to get tax exemption. Since federal law is supreme Scaglione cannot be used as an excuse or justification for Trustee Defendants avoiding accountability for violating 26 USC 401/503 or Securities laws 10b, 10b5 or 17a.

In this case we are concerned with many more facts including a few of the same facts as in Scaglione but the charges involve violation of federal not state laws. Therefore a referral of this case to NYState jurisdiction would foreclose judicial review of violation of federal laws by Trustee Defendants. In fact it would preclude any recourse since the financial liability for wrongdoing by TRS Trustees has been along with the removed / nullification of the prudent man rule, by the Scaglione decision and NYState laws.

CITATION

Supt. of Insurance v Baker Life & C.C. 404 US 12 (1971).

Section 10 (b)
must be read flexibly, not technically and restrictively. Since there was a "sale" of a security and since fraud was used "in connection-with" it, there is redress under § 10 (b), whatever might be available as a remedy under state law.

The Trustee Defendants err in stating on p.17 that

The investments by the Teachers Retirement System in MAC Securities and New York City Serial bonds were necessary to avert default by the City. A default by the City would have an adverse effect on the Teachers Retirement System. All members of the system would have been affected. These points are emphasized repeatedly in the February 23, 1976 report of the Committee on Ways and Means, House of Representatives on H.R. 11700, a bill which permits the trustees of the various New York City pension funds to invest in New York City Serial Bonds without losing the systems tax exempt status.

PL 94-236 originally H.R.11700 does not state that its purpose is to prevent NYCity bankruptcy although all of those who testified at the House Ways & Means Comm. Hearing on Feb. 23, 1976 did. There is no reasonable connection stated in the bill or offered to show that the funds of the five NYCity employee pension funds can or should be used to prevent default by the City. No other solutions were tried except suspension of payments on short term notes. At the time it was argued that suspension was necessary to prevent bankruptcy. But when the Court of Appeals ruled the suspension illegal, full payment of the billion dollars was made without recourse to city banks or city pension funds. It is therefore reasonable to say that there is no proof to support Trustee Defendants assertion that TRS investments were "necessary to avert default by the city".

Trustee Defendants offer the testimony of Bernard Goldberg, TRS Teacher Trustee before the House Ways & Means Comm. to justify TRS investments in NYCity obligations. (p.18). Mr. Goldberg testified as a representative of the United Federation of Teachers, the teachers union

Mr. Goldberg has been on the payroll of the UFT for ten years. Although he receives his full teaching salary of approx. \$22,000 while relieved of all school duties, his UFT salary is larger than the average pension paid TRS retirees. No salary is paid any other Union Comm. Chairman, Mr. Goldberg is Chairman of the Union Pension Comm.. This conflict of interest has led to his transfer of loyalty from the TRS to the UFT and NYCity.

Trustee Defendants quote Mr. Bigel's testimony before the House Comm. as authoritative. Mr. Bigel, a paid union consultant stated on page 30 of the House Hearing Report of Feb. 23, 1976, " I believe.... that the assets at hand in the event of the city's bankruptcy would enable the systems to meet their obligations primarily to the retired members and to those eligible for retirement for a period not in excess of 6 to 8 years.." This is deceptive because it brackets "those eligible for retirement" with those who have retired, mixing apples and oranges.

Those eligible for retirement are members of the present teachers pay as you go retirement trust which is 8% funded. The 92% unfunded accrued liability of NYCity to TRS Annuity Savings Fund and Contingent Reserve Funds is \$2.7 billions. (The accrued unfunded liability to the five NYCity employee pension funds according to the Shinn Report is \$8.48 billions. The loss in interest to the five funds amounts to \$680 million per year.) If the City went bankrupt there would be no funds for those eligible to retire except the 8%.

The retirees are fully funded in entirely separate trusts which are legally and financially independent of the present teachers trusts. To treat the 8% and the 100% trusts as one entity is deceptive and misleading preventing Congress from truly expressing its will.

The facts as they should have been but were not presented to Congress were given in the Nov. 2, 1975 issue of the N.Y. Teacher by TRS Trustee Mr. Mitchell:

There have been Actuarially adequate reserves set aside to provide lifetime payments to members already retired. These reserves are not city funds. They are controlled by a separate entity, the New York City Teachers' Retirement Board. These funds cannot be attached in case of city bankruptcy nor used for any other purpose than to pay benefits to members.

On p.33 of the House Report Mr. Bigel offers Table 4. It gives the June 30, 1978 ratio of total assets invested in NYCity obligations as 26.8%. Concealed from Congress was the Shinn (Chairman of the Metropolitan Life Ins. Co.) Report below which gives the figure as 50%. This provides a fair measure of Mr. Bigel's reliability in advising Congress.

From p.12 of Mayor's Management Advisory Board, (Shinn) Report of March 17, 1976.

it is important to bear in mind that the actuarial valuations undertaken, and the recommendations and projections proceeding therefrom, have all been based on the book value of assets as of June 30, 1974, the last date as of which definitive data were made available to the Task Force. Thus, the effect of subsequent changes in the quality and composition of assets of the funds, as well as the possible recognition of market values, are not reflected. Such effects could be significant since, among other things, it is understood that sales of fixed-interest securities during 1975, and investment of the proceeds in obligations of the City and the Municipal Assistance Corporation, took place to the extent that roughly 20 percent of the book value of plan assets at December 31, 1975, were comprised of City-related securities. Further, it is understood that commitments already made with respect to the City's financial situation could result in an increase in this percentage to as much as 50% by June 30, 1978.

PL 94-236 is unconstitutional because the will of Congress was not truly expressed because it was misinformed by House Ways & Means Comm. witnesses all of whom favored the bill.

Not one of the 90,000 city employee pensioners was heard or invited to attend, nor one of their organization representatives. No single opposition speaker was heard to point out that PL 94-236 was coercive. (Coerce: to induce action which would otherwise not be taken.)

TRS Trustees stated in the Nov. 26, 1975 Agreement in paragraph 7e(iii) that they would not buy NYCity bonds unless Congress passed an act waiving application of 26 USC 401/503 and unless as stated in paragraph 7e(vi) a state law was passed waiving fiduciary liability for them.

"But for" the passage of PL 94-236 which included the Agreement, TRS Trustees would not have sold TRS sound corporates at a loss to buy NYCity bonds above market when they were rated Caa, illegal for purchase by 14,400 National and FDIC banks in the USA.

No pensioner was permitted to point out to Congress that by suspending 26 USC 401/503 and backdating, Congress was suspending judicial review of TRS Trustees wrongdoing; removing the penalty for wrongdoing; discriminating against an aged, poor, politically powerless minority by depriving them of protective legislation in effect since 1940 and violating their 5th Amendment due process and equal protection rights. -- They were giving TRS Trustees a license to commit fraud in violation of Securities laws.

CITATION

Trebotich v C.I.R. 492 F 2d 1018 (1974)

6. Internal Revenue C-868

Protections provided under qualified trust provisions of Code are geared, not to employer's legal obligation to continue plan but to assistance of continuing program under which funds, already contributed, are protected from direct

or indirect diversion contrary to interests of employees, and statute envisions actual setting aside of funds in protected trust, and not merely existence of promise, whether enforceable or not, to pay benefits when they become due.

CONSTITUTIONALITY OF PL 94 236.

Trustee Defendants err in asserting on p.20, POINT II that PL94 236 is constitutional because "it does not violate the equal protection clause... (it) relates to ...an economic matter, which is not a fundamental right."

In Examining Board v Flores de Otero 426 US 604 (1975) the right to earn a livelihood is considered "the essence of personal freedom" and its denial a constitutional violation.

It follows from this precedent that teachers retired as too old to work after 25 to 50 years of dedicated service who during that time contributed their savings to make up 47% of the assets of the fully funded TRS security investment/pension trust have a fundamental right to a livelihood in the form of a pension.

PL 94-236 burdens this fundamental right by its discriminatory provisions. One Justice said "the state cannot be permitted to dishonor its promise." There is no precedent for its five city employee pension fund classification which dishonors the promises of protection of 26USC401/503; the fairness to minorities doctrine; the doctrine of judicial review and a remedy for wrongdoing; and the Fifth Amendment equal protection and due process rights afforded all other pensioners similarly situated.

Trustee Defendants err on p.20 in their only citation of Tron v Condello, to support the statement that "The appropriate standard for reviewing PL 94-236 is the rational relationship test."

Tron v Condello challenged the constitutionality of state laws only, not any federal law. PL 94-236 is not mentioned once in Judge Conner's 41 page decision. His references to "fundamental right" and

"rational relationship" dealt with Tron's second claim for relief the retirees right to vote for TRS Teacher Trustees. This was dismissed on the ground that the one man one vote requirement does not apply to TRS because "it does not exercise 'normal governmental' authority."

This is a far cry indeed from the federal issues involved in PL94-236.

The citations offered by Federal Defendants to justify the classification were Christian Echoes National Ministry v USA and Mass. Board of Retirement v Murgia. The first case dealt with an appeal from withdrawal of tax exemption for political activity and the second with forced retirement because of age. Neither is in any way related to the issues at hand.

No pension system can be rationally related to saving a city from bankruptcy because the goal of all pension systems is to preserve its fully funded investment to assure payment of pensions. This is mutually exclusive with the goal of saving a city or other employer from bankruptcy.

Trustee Defendants err in stating on p.20 that there is a rational relationship between "the legislative classification" of five city employee pension funds and "the purpose of PL 94-23⁶(because) PL 94-236 was a necessary part of the plan to save the City of N.Y. from bankruptcy."

The discriminatory classification mimics the biblical practice of scapegoating. In times of crisis when things got tough, a goat was chosen on whose head was symbolically placed the sins of the people. Then he was driven into the wilderness.

Allowing perhaps for inflation since biblical times, now five goats have been chosen. The five city employee pension trusts have been singled out and treated differently from the other 600,000 pension trusts

registered with IRS, and they have been driven out of the land of law into the lawless wilderness. Here and now they are no longer protected by 26 USC 401/503 in violation of their fifth Amendment equal protection rights.

Trustee Defendants err in stating on p.21 that

The pension systems and trust funds not participating in the November 26, 1975 Agreement are properly excluded from P.L. 94-236 because their investments are not related to the program to save the City from bankruptcy nor are they dependant upon annual City contributions.

There are thousands of NYCity pension and trust funds. According to the N.Y.Times 8-11-76 five NYCity banks(not chosen as scapegoats), manage trust funds of \$81.4 billion, as of 12-31-75.

IN Billions

Morgan Guaranty	\$22.
Citibank	21.2
Bankers Trust	18.9
U.S.Trust	9.8
Manufacturers H.	9.5
	<u>\$81.4</u>

None of these bank managed trust funds have a different legal or financial relationship/to the City of N.Y./than the five city employee pension trust funds.

The TRS retiree trust funds, Annuity Reserve Fund and Pension Reserve Fund #1, like the bank trust funds above receive NO annual city contributions. PL 94-236 classification clearly discriminates vs the Plaintiff and Pensioner Minority.

The annual city contribution to the present teachers trusts are deferred wages , a city debt based on a legal labor agreement which has the same standing as all other city debts such as its outstanding bonds. And to discriminate against pension trust debtors while paying

off \$2.2 billions in bond amortization in the past two years is a Fifth Amendment violation of the equal protection rights of present teachers who are equal creditors but treated differently.

Trustee Defendants err in stating on p.20 that

The legislative classification involved in the instant case is directly related to the purpose of P.L. 94-236.

Public Law 94-236 passed on March 19, 1976, provides as follows:

(2) on or after August 20, 1975, and before January 1, 1979, considers, for purposes of determining investments to be made by the plan or trust, the extent to which such investments will--

(A) maintain the ability of the city of New York--

(i) to make future contributions to the plan or trust.
and

(ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan or trust, and

(B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust;

Regarding 2(A)(i) above: Only the separate 8% funded present teacher trusts are dependant on annual city contributions. It is not rational to take a billion dollars from the investment savings of the retired teachers trusts and destroy its 100% funding in order to contribute to the 8% funded assets of the present teachers "pay as you go" trusts.

Not only are the retiree Pensioner Minority trusts not dependant on "annual city contributions" but they were tapped by the City by means of a special State law of \$56 million on June 30, 1974 of earnings greater than required to cover its pension payroll.

no capacity
Regarding 2(A) (ii) above: The City has no intention/and no obligation to pay pensions if TRS goes bankrupt.

Regarding 2(B) above: PL 94-236 DESTROYS the "protect(ion of) the sources of funds to provide retirement benefits" by legalizing gambling by TRS Trustees with the life savings/investments of the TRS Pensioner Minority by suspending application of 26 USC 401/503.

According to the Citizens Budget Comm. the total city and MAC bonded debt on June 30, 1977 was \$12.5 billions.

The City debt to the five employee pension funds consists of \$3.5 billion of NYCity obligations and \$8.5 billion of unfunded accrued liabilities totaling \$12 billions.

This level of risk resulting from PL 94-236 's effort to "protect the sources of funds to provide retirement benefits" is immoral as well as irrational.

The Congressional level of discrimination of PL 94-236 can be judged by the fact that of the more than \$1 billion of TRS funded assets invested in NYCity obligations 87% or more come from the savings investment trusts of the TRS Pensioner Minority.

CITATION

Weinberger v Wiesenfeld 95 S.Ct. 1225 (1975)

"in equal protection cases the Supreme Court need not accept at face value assertions of legislative purpose where an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been the goal of the legislation."

This clearly applies to PL 94-236.

Chief Justice Marshall stated, "The peculiar circumstances of the moment may render a measure more or less wise, but it cannot render it more or less constitutional."

CONCLUSION

The judgment of the Court below should be reversed and temporary injunctions to protect the remaining assets should be issued pending trial on the merits, because Plaintiff has standing^{it} against Trustee Defendants ^{issue} and/whether PL 94-236 is unconstitutional warrants trial.